

basis for Defendant's motion was that Defendants were allegedly faced with a difficult decision and needed more time to consider their choice.

3. Monsanto opposed Defendants' motion, and the Court heard oral argument on Defendant's motion in telephonic proceedings on August 23, 2010. (Dkt. 318 at 4:15-19). During that teleconference, Monsanto's counsel, Mr. Lombardi, offered a compromise, whereby Monsanto would agree to Defendants' requested extension to September 8, 2010, *provided that any opinions of counsel would be disclosed prior to the Court ruling on claim construction*. (*Id.* at 14:1-9) ("And what I had proposed was what I -- I think is a reasonable solution, which is if they need more time, we give them their extension. And if -- if it's acceptable to Your Honor, Your Honor would hold your ruling on Markman until such time as they've made a decision to disclose or not to disclose. And then we'd be given an opportunity to address anything we thought we needed to address as a result of the disclosure of the opinions before Your Honor arrived at a decision on -- on Markman.").

4. The Court stated that "Mr. Lombardi's recommendation seems sound to me," (*Id.* at 15:12-13), and Defendants' counsel accepted that proposal. (*Id.* at 15:14-17:3). The Court asked the parties to memorialize the agreement in a stipulation. (*Id.* at 16:10-11).

5. Following that telephone conference, Defendants sent Monsanto a draft stipulation that did not even attempt to memorialize the agreement. Rather, Defendants' draft unilaterally proposed to extend the disclosure deadline for opinions an *extra* month-and-a-half beyond the already-extended September 8, 2010 date. (Dkt. 333-1 and 333-2). Nevertheless, in a spirit of further compromise, Monsanto's counsel offered a compromise date of October 1, 2010, if approved by the Court. (Dkt. 333-3).

6. Ignoring the Court's request to memorialize the August 23, 2010 agreement in a stipulation, Defendants did not respond to Monsanto. Instead, they filed a motion to bifurcate that sought to indefinitely extend the deadline for Defendants to disclose opinions of counsel.

7. As a result, no stipulation was ever filed memorializing the parties' agreement. Later, the Court's Second Amended Case Management Order, submitted on September 17, 2010, restated the original August 23, 2010 deadline for disclosure of opinions of counsel. (Dkt. 350 at 3(d)). That deadline – along with the extended September 8, 2010 deadline – has long since passed.

8. Defendants did not have the ability to unilaterally alter the deadline for the submission of opinions of counsel by filing a motion to bifurcate, nor did they have the right to unilaterally alter the parties' compromise agreement, set forth in the August 23, 2010 transcript. Thus, Defendants have long since waived any right to rely on the opinions of counsel to defend against willful infringement.

9. Despite this, Defendants claim that the deadline for disclosure of opinions of counsel has been suspended indefinitely and that they have not waived the right to rely on opinions of counsel.

10. Factual discovery is proceeding in this case and is currently set to close on December 17, 2010. To prepare for the upcoming depositions of key factual witnesses, Monsanto needs to know definitively whether Defendants will rely on the advice-of-counsel defense to willful infringement.

11. Monsanto asks that the Court enter an order confirming that Defendants have waived any right to rely on the advice of counsel defense by failing to produce opinions of

counsel by the deadline set in the Court's Case Management Order, or by the September 8, 2010 compromise date agreed in the August 23, 2010 teleconference.

12. To the extent that Defendants are deemed *not* to have waived the right to rely on the advice of counsel defense, Monsanto requests that the Court enter an order requiring Defendants to make their decision regarding advice of counsel immediately. Under the parties' August 23, 2010 agreement, to the extent that Defendants would rely on the advice of counsel, Defendants were required to produce any opinions of counsel to Monsanto *prior to the Court's claim construction decision*. (Dkt. 318 14:1-9, 15:12-17:3). Thus, to the extent the Court does not find waiver, the Court should defer any ruling on claim construction until after Defendants' have made their election, produced the relevant documents, and given Monsanto an opportunity to respond to those documents, as the Court previously stated. (Dkt. 318 at 13:2-7, 15:12-13).

WHEREFORE, Monsanto respectfully requests that this Court GRANT Monsanto's motion.

Dated: October 28, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of October, 2010, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Eastern District of Missouri, Eastern Division, and was served by operation of that Court's electronic filing system, upon the following:

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